85-1581

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO
YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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March 1986

QUESTIONS PRESENTED

I. May a court find that an offense committed off-base at a place where there is no military post or enclave is service-connected simply because of the civilian dependent status of the victim?

II. May a court depart from its precedents setting out the constitutional limits of court-martial jurisdiction over offenses against civilian dependents and apply a more expansive interpretation in the very same case?

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No. _____

RICHARD SOLORIO
YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, Richard Solorio, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding on January 27, 1986.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 21 M.J. 251 (C.M.A. 1986) (Appendix 1a-17a). The opinion of the Coast Guard Court of Military Review appears at 21 M.J. 512 (C.G.C.M.R. 1985) (Appendix 18a-42a).

JURISDICTION

The judgment of the Court of Military Appeals was entered on January 27, 1986, affirming the Coast Guard

Court of Military Review's decision granting the government's appeal and reversing the trial judge's ruling dismissing several charges and specifications for lack of subject matter jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. §1259.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Article III, §2, C1. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . ."
>
> Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be . . . deprived of life, liberty, or property, without due process of law; . . ."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

The Rules for Courts-Martial, Manual for Courts-Martial, United States, 1984, provide as follows:

> Rule 201(b): "Requisites for court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise, for a court-martial to have jurisdiction:
>
> * * *

> (5) The offense must be subject to court-martial jurisdiction.
>
> **Discussion**
>
> *See* R.C.M. 203. The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. . . ."
>
> Rule 203: "Jurisdiction over the offense. To the extent permitted by the Constitution, courts-martial may try any offense under the code and, in the case of general courts-martial, the law of war."

The discussion and analysis of Rule 203, are attached as Appendix 43a-48a and Appendix 49a-54a, respectively.

STATEMENT OF THE CASE

The petitioner, an enlisted man in the Coast Guard, was charged with fourteen specifications alleging indecent liberties, lascivious acts and indecent assault in violation of Article 134, Uniform Code of Military Justice [UMCJ],[1] six specifications alleging assault in violation of Article 128, UCMJ,[2] and one specification alleging attempted rape in violation of Article 80, UCMJ.[3] The court-martial invoked jurisdiction under Article 2, UCMJ, 10 U.S.C. §802. At a pre-trial hearing on June 3 and 4, 1985, petitioner made a motion to dismiss all the charges and specifications alleging assaults and attempted rape, and seven of the specifications alleging indecent liberties, lascivious acts and indecent assault in violation of Article 134, UCMJ, for lack of subject matter jurisdiction.

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[1] 10 U.S.C. §934.
[2] 10 U.S.C. §928.
[3] 10 U.S.C. §880.

The fourteen specifications petitioner moved to dismiss all alleged offenses at Juneau, Alaska. The seven remaining specifications alleged similar, but unrelated, offenses at Governors Island, New York, a Coast Guard base.

After hearing evidence and argument on the motion, the trial judge dismissed the fourteen specifications alleging offenses at Juneau and the charges of violating Article 128 and Article 80, UCMJ, because the offenses lacked service-connection. The trial judge made findings of fact[4] on the record (Appendix 55a-61a) and prior to authenticating the record attached supplemental findings of fact (Appendix 62-63a).

The dismissed charges and specifications allege offenses against two girls. *United States v. Solorio*, 21 M.J. 512, 514 (C.G.C.M.R. 1985). The fathers of these girls were, like petitioner, active duty members of the Coast Guard assigned to the staff of the Commander, Seventeenth Coast Guard District. *Id.* All the offenses allegedly occurred in petitioner's privately owned home eleven miles from the Federal Office Building in downtown Juneau where he worked. *Id.* The alleged victims and their families also lived in civilian housing, there being no government quarters in Juneau for anyone other than the District Commander. *Id.*

In Juneau at the tine of the alleged offenses, there was no Coast Guard controlled post or enclave where many service personnel lived and worked. *Id.* at n.1. The closest equivalent in Juneau was the Coast Guard Station, a 1.3 acre facility with a complement of fourteen enlisted persons. *Id.* Over two hundred Coast Guard military personnel were assigned to the district office, occupying four of the nine floors of the Juneau

[4] Rule 905(d), Rules for Court-Martial, Manual for Courts-Martial, United States, 1984, requires the military judge to state his essential findings of fact on the record when factual issues are involved in determining a motion.

Federal Office Building, where other Federal agencies are also located. *Id.* The Coast Guard Marine Safety Office situated in a building adjacent to the Federal Office Building had a military complement of seventeen persons. *Id.* With the possible exception of some of the complement of six officers and forty-nine enlisted personnel on the buoy tender berthed at the Coast Guard Station, all of the approximately three hundred Coast Guard military personnel in Juneau lived in the civilian community. *Id.*

A friendship had grown between petitioner and the families of the alleged victims, grounded in one case on the common sporting interests of bowling and basketball, and in the other, on the fortuity of living next door. *Id.* at 514. The alleged victims came to petitioner's home on a regular basis to visit with his two sons. *Id.* Both girls at one time played on a soccer team coached by petitioner and they bowled in a league in which he was active. *Id.* These associations were much more significant than any military relationship between petitioner and the fathers of the alleged victims, which the trial judge found to be *de minimis*. Record at 131 and Appendix at 58a.

There was no evidence that any of the allegations have become common knowledge, even among the Coast Guard personnel, at Juneau. No allegations were made against petitioner until all parties had been permanently transferred to duty stations outside Alaska. *United States v. Solorio*, 21 M.J. 512, 514 (C.G.C.M.R. 1985). Petitioner was stationed at Juneau from November 1980 to June 1984. Appellate Exhibit IV. Warrant Officer Johnson and his family, including Amber Johnson, left Juneau in June 1983. Record at 43 and Appellate Exhibit VI. Amber did not make any allegations against petitioner until March 1985. Record at 47. Petty Officer Grantz and his family, including Jennifer

Grantz, left Juneau in June 1984. Record at 60. Jennifer did not make any allegations against petitioner until about April 1985. Record at 63.

The Alaska prosecutor, in a letter to the Coast Guard, stated "that at this time, subject to future evaluation or developments, that the Department of Law, Criminal Division, State of Alaska, will defer prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutional arm of the Coast Guard." Appellate Exhibit IX. However, there was also evidence that the State of Alaska had recently prosecuted two similar cases involving members of the Coast Guard with results highly satisfactory to the Coast Guard. Appellate Exhibit X. And at trial, Special Agent Gary Smith testified that the State of Alaska was continuing to investigate allegations that the accused had sexually abused the children of other civilians still living in Juneau. Record at 87.

The accused is presently assigned to Coast Guard Group New York at Governors Island, New York, where he lives in Government quarters and where the instant general court-martial was convened. *United States v. Solorio*, 21 M.J. 512, 514 (C.G.C.M.R. 1985).

In his findings of fact, the trial judge addressed the twelve *Relford* factors[5] and the nine additional *Relford* considerations,[6] and found that none of them supported a finding of service-connection. Additionally, the military judge considered, among other things, the military relationship between petitioner and the service-member fathers of the alleged victims, the effect of the alleged offenses on morale, discipline or effectiveness within the military community in Juneau, the reputation of the Coast Guard with the civilian community in

[5] *See Relford v. Commandant*, 401 U.S. 355 (1971), and Appendix at 44a-46a.

[6] *Id.*

Juneau, the relation of the offenses alleged to have been committed in Alaska to the offenses alleged to have been committed in New York, and the impact of the alleged offenses on the servicemember fathers of the alleged victims and through them on the service. The military judge found that the asserted impact upon the service was too remote and indirect to support service-connection.[7]

The government appealed the military judge's ruling to the Coast Guard Court of Military Review and that court granted the government's appeal, reversing the military judge. Before the Coast Guard Court of Military Review petitioner argued, in opposition to the government's appeal, that the military judge had properly applied the service-connection test required by *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), and properly found that the facts of this case did not support subject matter jurisdiction.

The United States Court of Military Appeals granted review of the Coast Guard Court's decision and affirmed. In his petition for grant of review, petitioner argued that the Court of Military Review's decision was incorrect because it had not properly applied the service-connection test required by *O'Callahan*, and *Relford*, and because the military judge had properly found that the facts did not support subject matter jurisdiction.

[7] "In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service-connection. That indirect impact consists of servicemember-parents' preoccupation with family situation affecting the members' performance, some initial counseling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J." Military Judge's Supplemental Findings of Fact, Appendix at 62a-63a and *United States v. Solorio*, 21 M.J. 251, 253 (C.M.A. 1986).

Petitioner made a motion to the Court of Military Appeals to stay the court-martial proceedings to permit him to petition for a writ of certiorari. By its order dated February 5, 1986, the Court of Military Appeals denied the motion. Petitioner then made application to Chief Justice Warren E. Burger for a stay of the court-martial proceedings pending timely filing and disposition of a petition for a writ of certiorari. The Chief Justice denied the application on February 10, 1986.

The court-martial proceedings went forward on February 18, 1986, and on March 11, 1986, petitioner was convicted of eight of the fourteen specifications alleging offenses in Alaska. Petitioner was also convicted of four of the seven specifications alleging offenses in New York.

REASONS FOR GRANTING THE WRIT

There is good cause to grant this petition for a writ of certiorari because the United States Court of Military Appeals' decision in this case conflicts with this Honorable Court's decisions in *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971). The Court of Military Appeals' decision expands court-martial subject matter jurisdiction far beyond the constitutional limits spelled out in *O'Callahan* and *Relford*.

In this case, the Court of Military Appeals has obviously employed its flexible subject matter jurisdiction analysis;[8] an analysis that is not bound by the result that

[8] The United States Court of Military Appeals began its departure from what it termed a "slavish" application of the *Relford* criteria in *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). It has continued this trend in its decisions in *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Johnson*, 17 M.J. 73 (C.M.A. 1983); and in the instant case.

application of the *Relford* factors and considerations requires, and that does not set any limits on other criteria that may be considered. This analysis renders the service-connection test so pliable it is meaningless and it provides servicemembers no protection of their constitutional rights. It gives military courts a completely free hand to find that service-connection exists on the basis of any single factor or combination of factors, tangible or intangible, proven or presumed. Moreover, by rejecting the *Relford* factors and considerations as controlling, the Court of Military Appeals' decision, at the very least, sets the law of service-connection back to the time, after *O'Callahan* but before the *Relford* decision, when the "infinite permutations of possibly relevant factors"[9] created doubt and confusion about the limits of subject matter jurisdiction.

Clearly, however, the Court of Military Appeals' flexible service-connection test is being used, case by case, to eviscerate the *O'Callahan* and *Relford* decisions. In *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), the Court of Military Appeals extended military subject matter jurisdiction to all drug offenses. In this case it has extended military subject matter jurisdiction to all sex offenses against dependents. In its latest subject matter jurisdiction case, the Court of Military Appeals has indicated that it may be willing to accept the position that all offenses committed by officers are service-connected. *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

Another strong reason to grant this petition is that the record does not and cannot support subject matter jurisdiction. Petitioner submits that the trial judge was correct in finding that the Coast Guard lacked subject

[9] *O'Callahan v. Parker*, *supra* at 284 (Harlan, J., dissenting).

matter jurisdiction over the charges and specifications he dismissed. There is no Coast Guard post or enclave, in the usual sense of those terms, at Juneau and the offenses have not become public knowledge in Juneau; therefore, any impact of these offenses on the Coast Guard has been remote and indirect as the trial judge properly found.

The Court of Military Appeals' decision does not address the *Relford* factors and considerations, or the fact that the trial judge considered all of them and did not find a single one that supported service-connection. Instead, the decision relies principally on a holding that, as a matter of law, the impact of the dismissed offenses on the fathers of the alleged victims caused an impact on the Coast Guard sufficient to support subject matter jurisdiction. This holding bases jurisdiction solely on the dependent status of the victims and is inconsistent with the trial judge's finding of fact that the impact of the dismissed offenses on the fathers of the alleged victims had only a remote and indirect impact on the Coast Guard. *See* note 7, *supra*.

The Court of Military Appeals' application of its expansive subject matter jurisdiction test to petitioner is grounds for summary reversal. Whether or not that Court's interpretation of the reach of the Uniform Code of Military Justice conflicts with this Court's decisions, its application to petitioner in this case violates Fifth Amendment due process. *Marks v. United States*, 430 U.S. 188 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

In *Marks*, this Court held that the application of a decision expanding the constitutional reach of a statute, that proscribed conduct in sweeping language, to conduct that occurred before the decision was improper. In that case, the constitutional limits on statutes proscribing obscenity were relaxed in a decision rendered after the defendants had allegedly transported obscene ma-

terial in interstate commerce. The application of the more expansive standard for obscenity to the defendants there was held to violate the Due Process Clause because it would have the same effect as an *ex post facto* law.

Here, the Court of Military Appeals has relaxed the constitutional limits on the reach of the Uniform Code of Military Justice, and in particular Articles 80, 128 and 134, 10 U.S.C. §§80, 128 and 134, as they relate to off-base sex offenses against civilian dependents. Those statutes proscribe conduct of servicemembers in sweeping language that this Court has confined within constitutional limits in *O'Callahan* and *Relford*. This decision is contrary to the Court of Military Appeals' own precedents which held that conduct like that involved here was beyond the reach of the Uniform Code of Military Justice. *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969).

The Court of Military Appeals, however, did not address the due process issue in this case. The Court merely stated that:

> Admittedly, our precedents involving off-base sex offenses against civilian dependents of military personnel would point to a different conclusion. *See*, e.g., *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), which concerned drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience. [Footnote omitted].

United States v. Solorio, 21 M.J. 251, 254 (C.M.A. 1986).

The comment in a case concerning drug activity that "some" earlier opinions on service-connection need to be reexamined certainly cannot have satisfied the petitioner's right to fair warning about the reach of military statutes proscribing sex offenses. For one thing, the most significant rationale for the *Trottier* decision was that, because of their impact on military readiness, "it is necessary and proper in today's world that court-martial jurisdiction over most drug offenses be invoked as a proper exercise of the war powers." *United States v. Trottier*, *supra*, at 352. There has been no suggestion that off-base sex offenses similarly affect military readiness or are otherwise related to authority stemming from the war power.

Furthermore, the expansion of the reach of the Uniform Code of Military Justice to these offenses deprives petitioner of constitutional trial rights that even Congress could not retroactively strip from him. Such a law would be an *ex post facto* law. If Congress cannot pass such a law, the Court of Military Appeals cannot achieve the same result by judicial construction. *Bouie v. City of Columbia*, *supra* at 353-354. Of course, Congress has not attempted to legislatively expand military jurisdiction over off-base sex offenses, even prospectively.

Although this case can be disposed of by a summary reversal, this Court should address the subject matter jurisdiction issues presented. Clearly, the military courts, following the lead of the Court of Military Appeals, are going to continue to find jurisdiction in every significant case until this Court reaffirms *O'Callahan* and *Relford* as the law, or sets some other reasonable limits on the criteria that can support military jurisdiction.

This Court observed in *O'Callahan* and *Relford* that Article I, §8, c1.14 and the Fifth Amendment allow Congress to create military courts which need not provide all the procedural safeguards essential in an Article III court. On the other hand, the Court found that in cases not subject to courts-martial, Article III, §2, c1.3, the Sixth Amendment, and possibly the Fifth Amendment, guarantee the rights to indictment by grand jury and trial by jury before a civilian court.

This Court has clearly stated that it intends the service-connection test to balance these constitutional rights of servicemembers against the military's interest in trying the case at a court-martial. While acknowledging that the special needs of the military justify a separate military justice system, the Court recognized that "expansion of military discipline beyond its proper domain carries with it a threat to liberty." *O'Callahan v. Parker*, *supra*, at 265. Moreover, the Court observed "the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to the 'least possible power adequate to the end proposed.' " *Id.* (citing *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)).

The Court of Military Appeals' decision, however, does not give proper consideration to the interests of servicemembers. It suggests that any asserted impact upon the military, regardless of how remote or indirect, will be sufficient to outweigh the servicemember's constitutional rights. The Court of Military Appeals seems to have embraced the position of one writer who has suggested that the imagination of the government is the only limitation on court-martial subject matter jurisdiction.[10]

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[10] Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker*, 25 A.F.L.Rev. 1 (1985).

The Court of Military Appeals' decision sets this area of the law back to the time before *Relford* explicitly spelled out clear standards for deciding whether or not subject matter jurisdiction exists. Justice Harlan, dissenting in *O'Callahan v. Parker*, *supra*, stated:

> the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissable. . . . Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdiction issue in each instance.

Id. at 284. He concluded, "the Court has thrown the law in this realm into a demoralizing state of uncertainty." *Id.* at 275.

In *Relford*, this Court reiterated that a crime must be service-connected to be tried by court-martial, but acknowledged that the *O'Callahan* decision had met with some generally critical comments including those of, then, Professor Everett. *Id.* at 357. The Court noted that some of the criticism expressed concern, as had Justice Harlan's dissent, about the confusion that *O'Callahan* might cause.[11] *Id.* Therefore, in *Relford* this Court clearly set out its analysis of the service-connection issue and that analysis has served as a model which has been followed by lower courts for more than

[11] Chief Judge Everett wrote in his article, *O'Callahan v. Parker–Milestone or Millstone in Military Justice?*, 1969 Duke L.J. 853, at 869, "[c]riticism of the majority opinion would be more muted if it had given a clearer test for deciding when military jurisdiction exists."

ten years. That service-connection analysis has eliminated the potential for confusion in this area of the law by limiting the "infinite permutations of possibly relevant factors" to the twelve "*Relford* factors" and nine additional considerations.

Prior to the *Relford* decision, it was those who favored expansive military jurisdiction that seemed most concerned about the unlimited factors that could be considered in deciding whether or not an offense was service-connected. They were concerned that military interests would not receive proper consideration. Now it is the servicemember who is concerned that his individual interests are not being protected. While rejecting the *Relford* factors and considerations as too inflexible, the Court of Military Appeals has not placed any limitations on other factors that can support subject matter jurisdiction. In this case, and in others,[12] the Court of Military Appeals has indicated that any single factor or combination of factors, tangible or intangible, proven or presumed, may be sufficient to find that an offense is service-connected.

The Coast Guard Court of Military Review's decision in this case is a perfect example of how ready military courts are to exercise and expand this freedom to find jurisdiction based on the flimsiest claim of military interest. That decision bases subject matter jurisdiction primarily on the potential impact on petitioner's military neighbors at Governors Island. The impact was inferred entirely from the nature of the alleged offenses, even though the offenses allegedly occurred many months before they were disclosed and thousands of miles from Governors Island. Although the government had the burden of proving jurisdiction by a preponderance of the evidence, *see* Rules for Courts-

[12] *See* note 8, *supra*.

Martial (R.C.M.) 905(c)(1), and 905(c)(2)(B), Manual for Courts-Martial, United States, 1984 (MCM 1984), the Coast Guard Court inferred the potential impact without any proof of actual impact on Governors Island.

As this obviously suggests, the Court of Military Appeals' flexible analysis permits military courts to broadly infer impact from the nature of the offense. As a result, an offense may be found to be service-connected *per se*, in violation of this Court's requirement for a fact based determination of service-connection. *See Relford v. Commandant*, *supra* at 365-366. The Court of Military Appeals' decision, in this case, certainly implies that every sex offense committed by a servicemember against a child dependent is *per se* service-connected. *United States v. Solorio*, 21 M.J. 251, 256 (C.M.A. 1986).

No previous case has held that the dependent status of a victim is sufficient to support subject matter jurisdiction over an offense that has no significant and direct impact on the military. The dependent status of the victims was one of the factors supporting jurisdiction in *Relford*; but there were other significant factors, including the fact that the offenses were committed on a military post. In this case, however, the offenses occurred in the petitioner's private home in the civilian community, at a place where there is no military post at which servicemembers and their families live. Furthermore, the offenses have never become public knowledge, even among servicemembers, at the place where they occurred.

By Executive Order, the law of *O'Callahan*, and *Relford*, have been incorporated into the regulations that govern courts-martial. Rule 201(b), R.C.M., MCM 1984, states that courts-martial only have jurisdiction over offenses that are subject to court-martial jurisdiction. Rule 203, R.C.M., MCM 1984, makes any offense under the Uniform Code of Military Justice subject to

court-martial jurisdiction, to the extent permitted by the Constitution.

The Discussion and Analysis of Rule 203 were published by the Department of Defense in conjunction with the Department of Transportation. They are nonbinding, but they are entitled to great deference and weight because they set forth the drafters' views of the state of the law of subject matter jurisdiction. The Discussion of Rule 203 clearly reflects the continuing vitality of this Court's decisions in *O'Callahan* and *Relford*.

The section on "Determining service-connection" in the Discussion of Rule 203, begins with a recitation of the twelve factors and the nine additional considerations enumerated in *Relford*. *See* Appendix at 44a-46a. There is no hint in either the Discussion or the Analysis of Rule 203 that the dependent status of a victim is, by itself, sufficient to establish service-connection. Therefore, the Court of Military Appeals' decision, not only fails to follow this Court's decisions in *O'Callahan* and *Relford*, it conflicts with the settled law of subject matter jurisdiction, as understood and described by the drafters of Rule 203.

The Court of Military Appeals' has erred in suggesting that developments in the military and in society since the *O'Callahan* and *Relford* decisions justify rejection of its own precedents which properly applied those decisions. *United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986). The need to limit court-martial jurisdiction to its proper domain is as great now as it was when *O'Callahan* and *Relford* were decided.

Our society's increased concern for the victims of crime is no more reason to take the right to a civilian trial away from servicemembers than it is a reason for subjecting civilians to trial by court-martial. Any victim who felt that "a military trial is marked by the age-old

manifest destiny of retributive justice"[13] might prefer a trial by court-martial. That does not, in any way, justify depriving an accused of constitutionally protected trial rights.

Increased concern for victims is not a singularly military phenomenon. State officials would have been equally interested in protecting the victims' rights, if this case had been tried in state court. As the Court of Military Appeals has pointed out, Congress and state legislatures have made changes in civilian criminal systems to protect more fully the rights of victims. *United States v. Solorio*, 21 M.J. 251, 254-255 (C.M.A. 1986). Civilian courts, certainly, have not interpreted such changes as authority for the abridgment of constitutionally protected trial rights.

Although this petition for a writ of certiorari results from the affirmance of a decision granting a government appeal, the petition should be granted at this time. The subject matter jurisdiction issues are collateral to, and separable from, the merits of petitioner's court-martial. They have already been completely developed, and resolved in a fully dispositive decision. Clearly, the most compelling reason for granting the petition now is that petitioner may never again be able to ask this Court to consider this case, except by a collateral attack or a petition for extraordinary relief, even though he has been convicted and sentenced to a bad conduct discharge and a year of confinement.

This is a case where immediate review should be allowed because the question of jurisdiction has been finally decided, with further proceedings on the merits subsequently completed, but in which later review of the jurisdiction issue may be frustrated, despite the ultimate outcome of the case. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). There is no

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[13] *O'Callahan v. Parker*, *supra* at 266.

question of the Court's jurisdiction to review the case at this time. Under 28 U.S.C. §1259 and Article 67(h), UCMJ, 10 U.S.C. §867(h) (1984), this Court may review any decision of the Court of Military Appeals, whether final or not, except for a decision not to grant a petition for review.

On the other hand, in the normal course of appellate review this Court will have no jurisdiction to review this case unless the Court of Military Appeals reviews it again. The Court of Military Appeals, of course, reviews only a small fraction of the cases eligible for review. Therefore, this may be the last opportunity for the United States Supreme Court to address the important issues presented, in this case.

Moreover, failure to grant the petition at this time poses a threat of serious erosion of the important rights underlying the *O'Callahan* and *Relford* decisions; the servicemember's right, against subjection to excessive assertions of military jurisdiction, and to trial by a civilian court. If immediate review is not permitted, the Court of Military Appeals can ignore this Court's precedents with impunity, and continue to expand subject matter jurisdiction, in cases brought to it on government appeals.

This Court has often recognized the need to review judgments that have not terminated the proceedings. *See Abney v. United States*, 431 U.S. 651 (1977), *Stack v. Boyle*, 342 U.S. 1 (1951) (both on appeal from pretrial orders in federal criminal proceedings); *Gillespie v. United States Steel Corp.* 379 U.S. 148 (1964), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (both on appeal from decisions in federal civil actions while further proceedings were pending); *Cox Broadcasting Corp. v. Cohn*, *supra* (on appeal from decision in state court while further proceedings were pending).

The question of military jurisdiction in this case will not be meaningfully reviewed again in the military courts. All of the relevant facts were marshaled at the pre-trial hearing on jurisdiction. Petitioner's trial on the merits has not produced any additional facts that could affect the military courts' decisions on jursidiction, since those decisions are essentially based on just the dependent status of the victims or the general nature of the offenses. Therefore, immediate appeal should be permitted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Military Appeals.

Respectfully submitted,

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March 1986

APPENDIX

APPENDIX A

UNITED STATES, Appellee,

v.

RICHARD SOLORIO, YEOMAN FIRST CLASS
U.S. COAST GUARD, Appellant.

No. 53603.

CGCM Misc. No. 004-85.
U.S. Court of Military Appeals.
Jan. 27, 1986.

Accused, yeoman first class, United States coast guard, was charged with numerous sex offenses involving minor female dependents of fellow coast guardsman, which offenses allegedly occurred in Alaska and subsequently at Governor's Island. The military judge dismissed charges and specifications concerning Alaska offenses. The Coast Guard of Military Review, 21 M.J. 512, reversed. Accused petitioned for review. The Court of Military Appeals, Everett, C.J., held that service connection existed notwithstanding that offenses occurred off base while accused was properly absent from his unit and in a place not under military control.

Affirmed.

1. Military Justice §1411

A military judge's fact-finding power under Article 62 cannot be superseded by a Court of Military Review in an appeal under Article 62. UCMJ, Art. 62, 10 U.S.C.A. §862.

2. Military Justice §555

Off-base sex offenses allegedly committed by accused on minor daughters of fellow coast guardsman assigned

to the same district office as accused were subject of court-martial jurisdiction, notwithstanding that accused was properly absent from his unit and that offenses occurred in a place not under military control; departing from *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94; *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322; *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313. UCMJ, Arts. 39(a), 80, 128, 134, 10 U.S.C.A. §§ 839(a), 880m, 928, 934.

3. Military Justice § 552

Lack of in personam jurisdiction over a civilian who commits a crime having great impact on service personnel does not mean that there would be no court-martial jurisdiction over the same crime if committed by a service member.

4. Military Justice § 555

Sex offenses against young dependents of military personnel have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned and such effects tend to establish service connection necessary for court-martial of service member who perpetrates the offenses.

5. Military Justice § 555

Because accused's transfer from Alaska, where alleged sex offenses on minor daughters of fellow service member occurred, to Governor's Island, where accused allegedly perpetrated similar offenses on minor daughter of another service member, was a routine matter and in no way undertaken with a view to creating court-martial jurisdiction, it was appropriate, in determining service connection, to consider the situation as it presently existed and not merely as it existed in Alaska

when the crimes were committed but before they were discovered; same observation applied with respect to the Governor's Island offenses as regards consideration of similar offenses committed some months after charged offenses.

6. Military Justice § 552

Pendency of subsequent offenses for trial by general court-martial is relevant in determining service connection of prior, similar offenses.

For Appellant: *Lieutenant Commander Robert Bruce* (argued).

For Appellee: *Lieutenant Commander Thomas J. Donlon* (argued).

Opinion of the Court

EVERETT, Chief Judge:

Yeoman First Class Richard Solorio was charged under Articles 80, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 880, 928, and 934, respectively, with numerous sex offenses involving females under the age of 16, each of whom was the daughter of a Coast Guardsman. Fourteen specifications alleged misconduct occurring at Juneau, Alaska, between March 1982 and June 1984; and seven specifications concerned misconduct at Governor's Island during the period from November 20, 1984, to January 5, 1985. In a session under Article 39(a), UCMJ, 10 U.S.C. § 839(a), prior to trial, the defense moved to dismiss all the charges and specifications concerning the alleged offenses committed in Alaska on the grounds that they were not subject to court-martial jurisdiction. *See Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971); *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). After receiving

evidence and hearing argument, the military judge made findings of fact; and, based on those findings, he granted the motion to dismiss.

The Government appealed from this ruling pursuant to Article 62, UCMJ, 10 U.S.C. § 862, and the Coast Guard Court of Military Review reversed the military judge's ruling. 21 M.J. 512 (1985). In turn, Solorio petitioned this Court for review and moved for a stay in his trial, which meanwhile had been set for December 3, 1985. A hearing took place on this motion and on the petition, at which time counsel for the parties ably argued their respective contentions as to the court-martial's jurisdiction over the offenses dismissed by the military judge. We now conclude that the decision of the Court of Military Review was correct, and the Government should be allowed to proceed to trial on the specifications involving alleged misconduct at Juneau, Alaska.

I

At trial, counsel for the parties marshaled all available evidence and presented cogent arguments in support of their respective positions; and the military judge conscientiously made findings of fact as he sought to apply the criteria relevant in determining the issue of service-connection. *See Relford v. Commandant, supra*. According to these findings, Solorio

> was properly absent from his unit at the time of each . . . [offense in Juneau].
>
> –Each offense . . . occurred away from any military base at the accused's residence in the civilian community.
>
> –Each offense . . . occurred in a place not under military control.

* * * * * *

> [T]here was no connection between the accused's military duties and the alleged offenses.
>
> –The victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses.
>
> –Civilian courts are present [in Alaska] and available to adjudicate the offenses. While the State of Alaska has presently deferred prosecution in light of this proceeding, the State has not waived prosecution, nor declined to prosecute.
>
> –Accused was not in uniform and in no way flouted military authority at the time of the alleged offenses.
>
> –None of the alleged offenses posed a threat to any military installation . . . [or] resulted in any violation of military property.
>
> –All the alleged offenses are of the type traditionally prosecuted by civilian courts and are specifically of the type the Coast Guard has recently consented to have civilian courts prosecute Coast Guard members for in Alaska.

* * * * * *

> There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personnel assigned there, nor on military operations or missions. The impact apparent in this case, that is, on the parents and the victims themselves is no different than that which would be produced by civilian perpetrator.

* * * * * *

> There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. As to the effect of the alleged incidents toward the Coast Guard within the

civilian community, there has been speculation by military personnel, but little more. . . . There is no evidence that these alleged offenses were known by anyone in the community to have taken place, outside of law enforcement circles. I find no adverse impact on the reputation of the Coast Guard in Juneau has resulted from these incidents. . . . The impact of the alleged offenses, primarily reflected in the testimony of the service member parents of the victims, is that which might be expected of the victim of any crime of a similar nature, and while that impact may manifest itself in the work situation of those members, it does not rise to the level to compel the exercise of court-martial jursidiction in these circumstances. In this regard, I note the increased caution of the parents victims may now exercise over their children, the requirements for counseling, anxiety, and time away from work for legal proceedings. These concerns would be the same whether the status of the offender were military or civilian. There has been no impact on transfer of military personnel within the meaning of the Personnel Manual provisions which have been taken judicial notice of. There have been transfers of all involved parties without restrictions.

Among supplementary findings subsequently made by the judge were these:

4. Crime has an impact. The impact is felt on the victim and on those close to the victim. It is also reflected in the greater society of which the victim and offender are a part. Impact may be direct or indirect. In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service connection. That indirect impact consists of servicemember-parents' preoccupation with family situation affecting the members' performance, some initial counseling and referral from

persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J. Good order, discipline, morale and welfare of servicemembers have not been directly impacted. Service reputation has not been adversely affected and those attributes of service reputation in a community which have been testified about, for example, credit worthiness, job stability for spouses, members' and families' access to community activities; would not be negatively impacted if these offenses were to come to light.

* * * * * *

6. The offenses alleged to have occurred in Alaska are significantly remote in time and place from those alleged to have occurred in New York.

The Court of Military Review concluded that in his findings the judge had erred in several important respects. For one thing,

> it was error for the judge to base his assessment of impact on the Juneau command solely on the observed effect after departure of all parties.
>
> A more relevant finding in this area would pertain to the impact of these offenses on morale and discipline at Governors Island, where the accused is now stationed and living on base. The judge made no specific findings, however, with respect to the possible effect of the offenses on morale, good order and discipline within any command at Governors Island or on personnel under the authority and responsibility of the convening authority, Commander, Third Coast Guard District.

21 M.J. at 519. The Court of Military Review also disagreed

> with the judge's conclusion that the concern of the parents in this case "would be the same whether the

> status of the offender were military or civilian." Such a conclusion overlooked the possible unique and distinct effect from the discovery by the fathers that a fellow Coast Guardsman may have committed violative offenses, of the nature alleged, upon their daughters and the natural expectation of the fathers that those in positions of authority and responsibility within the Coast Guard would take appropriate action to vindicate the outrage felt from such a grievous breach of faith by one shipmate towards another.

Finally, the court below disputed a finding by the military judge "that 'there has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses.' " A letter from the Office of the District Attorney in Juneau indicated that state officials would "defer" to prosecution of Solorio by the Coast Guard. The Court of Military Review concluded that "[t]here is no assurance, however, that upon reconsideration the Alaskan authorities will decide to prosecute these offenses, even if the judge's dismissal for lack of military jurisdiction is allowed to stand upon final review." *Id.* at 520.

II

[1, 2] A military judge's factfinding power under Article 62 cannot be superseded by a Court of Military Review in an appeal under Article 62, *see United States v. Burris* 21 M.J. 140 (C.M.A. 1985.) To some extent the Court of Military Review may have erred in this direction; but any such error is immaterial, because, on the basis of undisputed facts, we conclude that the offenses in Alaska were service-connected.

Admittedly, our precedents involving offbase sex offenses against civilian dependents of military personnel would point to a different conclusion. *See, e.g., United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), which concerned off-base drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience.[1]

In so holding, we were not trying to rewrite the Supreme Court's opinion in *O'Callahan.* Instead, we sought to apply *O'Callahan* – as amplified by *Relford* – to conditions as they now exist. Our premise was that *O'Callahan* permitted us to consider later developments in the military community and in the society at large and to take into account any new information that might bear on service-connection. *Cf. Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43, 54 S.Ct. 231, 241-42, 78 L.Ed. 413 (1934); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

One recent development in our society has been an increase in the concern for victims of crimes. *See, e.g.,* President's Task Force on Victims of Crime, Final Report (Dec. 1982); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 Miss.L.J. 515 (1982). Thus, Congress[2] and state legislatures[3] have

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[1] The doctrine of *stare decisis* should never be applied to perpetuate a view which no longer has a sound basis. *See United States v. Jacoby* 11 U.S.C.M.A. 428, 430, 29 C.M.R. 244, 246 (1960).

[2] *See, e.g.,* the Victim and Witness Protection Act, Pub.L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. § 1501 note, 1503, 1505, 1510, 1512 note, 1512-1515, 3146, 3579 note, 3580, Fed.R. Crim.P. 32(c)(2) (1982); Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp.Probs. 225 (1984).

[3] Gittler, *Expanding the Role of Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L.Rev. 117 (Symposium issue 1984).

sought to protect more fully the rights of victims; courts have attempted to make less onerous the participation of victims in criminal trials;[4] and in sentencing, judges have increasingly been willing to consider information about the psychological impact of various crimes on their victims.[5]

In the present case, the alleged victims were two young girls, each of whom was the daughter of a Coast Guardsman assigned to the same district office as Solorio. It is well-recognized that children are especially susceptible to lasting psychological harm as a result of various types of sexual offenses. Indeed, this probably is the main reason for the enactment of laws to prevent the sexual exploitation of children, *see, e.g.* 18 U.S.C. §§ 2251-55, and for judicial decisions upholding such laws. *See, e.g., New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Not surprisingly, the child victims in this case began to receive psychological counseling after the crimes came to light.

When young children are sexually molested, parents also are in many ways victims of the crime. This seems especially true in the present case, for the parents were also receiving psychological counseling. Moreover, these parents were victimized financially, for they would have the legal responsibility to pay for any necessary medical and psychiatric treatment for their daughters – except to the extent that, as military dependents, the victims were entitled to medical care at government expense.

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[4] *See, e.g., Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983); Fed.R. Evid. 412 (rape shield).

[5] *United States v. Hammond*, 17 M.J. 218 (C.M.A.1984); *United States v. Marshall*, 14 M.J. 157 (C.M.A.1982). *See also Victim and Witness Protection Act, supra*, § 3, 96 Stat. 1249; Fed.R.Crim.P. 32(c)(2).

[3] The military judge found that "[t]he impact . . . on the parents" was "no different than that which would be produced by [a] civilian perpetrator." The Court of Military Review questioned this conclusion because it "overlooked the possible unique and distinct effect from the discovery by the fathers that a fellow Coast Guardsman may have committed violative offenses, of the nature alleged, upon their daughters." 21 M.J. at 520. However, even if the judge's finding was correct, it is not decisive as to court-martial jurisdiction. The lack of *in personam* jurisdiction over a civilian who commits a crime having great impact on service personnel does not mean that there would be no court-martial jurisdiction over the same crime if committed by a servicemember.

O'Callahan's primary concern is with the impact of crimes on the armed services and their missions. Unless there is such impact, no reason exists not to allow a servicemember the right to a jury trial and grand-jury indictment which he generally would enjoy if tried in a civilian court. In seeking to demonstrate impact, the Government offered evidence that, because of the trauma resulting from learning of the offenses against their daughters, the fathers could not function as effectively in their Coast Guard duty assignments as they had previously.

Of course, prior to discovery of the offenses, Solorio had been transferred from Alaska and was no longer serving with them. However, if this had not occurred, it obviously would have been difficult – if not impossible – for the victims' fathers to continue to serve in the District Office with him. Indeed, it is unlikely that Solorio and the two fathers could ever again be satisfactorily assigned together in one of the small units which is typical of the Coast Guard organization. Furthermore, because of the widespread hostility towards the offender that usually results from this type of sex offense, it would appear that Solorio's future

assignments would be greatly limited due to the tensions that his presence would create in an organization.

[4] Obviously, not every off-base offense against a servicemember's dependent is service-connected. For example, an off-post larceny from a dependent usually would not have the continuing effects which would cause it to be classified as service-connected. However, sex offenses against young children – offenses like those alleged in the charges against Solorio – have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned. This continuing effect tends to establish service-connection.

In *O'Callahan*, the Supreme Court ruled that, despite a servicemember's military status, he could not be tried by a court-martial for offenses that were not service-connected. This result was based on the premise that such offenses were not within the legislative power "[t]o make rules for the Government and Regulation of the land and naval Forces." *See* U.S. Const. art. I, § 8, cl. 14. It would seem to be a necessary corollary that Congress could not prohibit conduct that lacked service-connection, even if violations of the prohibition were to be tried in Federal District Court, where every constitutional safeguard clearly would be available to defendants.

On this premise, the determination of service-connection should be made only in light of the conditions existing when the alleged misconduct occurred, because, unless service-connection existed at that time, the conduct falls outside Congress' power to punish and no crime has been committed. Accordingly, events which occurred after commission of an alleged offense would be immaterial to the issue of jurisdiction. This means that, for example, in determining service-connection of a service-member's off-post crime, only the likelihood and feasibility of civilian prosecution at the time of the

crime could be considered – even if the crime were not discovered for some time after its occurrence; and subsequent changes in State law and policy which might increase or decrease that likelihood would be disregarded.

However, it appears to us that the emphasis in *O'Callahan* was not on the scope of substantive congressional power to regulate a servicemember's off-duty, off-post conduct,[6] but instead was on assuring that, as far as feasible, servicemembers would retain their constitutional right to grand-jury indictment and trial by petit jury. Thus, in *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973), the Court declined to appy *O'Callahan* retroactively, even though it appears somewhat anomalous to sustain convictions for violating rules which Congress had no power to prescribe.

If factors such as the probability of trial in a civilian court are relevant in determining service-connection, then we should consider whether as a practical matter there is any likelihood that, if the charges are dismissed, Solorio will be prosecuted in an Alaskan court. The letter from the District Attorney's Office, which indicated that the State would defer prosecution in favor of a military trial, was given little weight by the military judge. Even though the Court of Military Review criticized him in this regard, we also would not attach great significance to such a document. Otherwise, military authorities anxious to try a servicemember by court-martial might endeavor to persuade civilian pros-

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[6] It would seem that some acts on the part of servicemembers cannot be prohibited by Congress, no matter what might be the method for trying and punishing violations of the prohibition. *Cf. United States v. Nation*, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958); *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958); *Unites States v. Milldebrandt*, 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958).

ecutors to drop cases that they normally would prosecute, in an effort to create court-martial jurisdiction that otherwise would not exist.

[5, 6] On the other hand, we recognize that in cases like this, where the prospective defendant and the victims have left the State and moved to distant locations – Solorio to Governors Island; one of the victims and her father to the Washington, D.C. area; and the other to California – State officials are less likely to be interested in prosecuting. Moreover, if for some reason, the victims decide that they do not wish to go back to Alaska and undergo the trauma of testifying, it will be difficult to compel their attendance. Therefore, because Solorio's transfer to Governors Island was a routine matter and in no way undertaken with a view to creating court-martial jurisdiction, we conclude that it is appropriate to consider the situation as it now exists and not merely as it existed at Juneau when the crimes were committed but before they were discovered.

The same observation applies with respect to the commission of subsequent offenses at Governors Island. If service-connection must be determined solely in terms of events as they existed at the time of an alleged offense, then we could not take into account other offenses committed some months later. However, as we have indicated, *O'Callahan* – despite its reliance on Article I, section 8, cl. 14 of the Constitution – does not require that service-connection be evaluated in such a limited context. Accordingly, the pendency of the subsequent offenses for trial by general court-martial is relevant in determining service-connection.

In *United States v. Lockwood*, 15 M.J. 1 (C.M.A.1983), we declined to apply to the doctrine of "pendent jurisdiction" in deciding whether a court-martial was entitled to try certain offenses. Nonetheless, we observed that some of the factors which underlie that doctrine also

tend to establish service-connection. We noted the advantages in having all charges disposed of in a single proceeding and commented:

> The Government has an interest in assuring that a servicemember receives an appropriate punishment for his crimes and that, if feasible, he is rehabilitated. When the responsibility for punishing a course of criminal conduct is divided between civilian and military authorities, these goals may be hindered. For one thing, the servicemember is subject to two convictions rather than one and this may carry adverse collateral consequences which make it more difficult for the accused to be rehabilitated. Since two trials must take place, rather than only one, the accused may undergo two ordeals and remain uncertain about his fate until the second trial is concluded. Commencing a successful rehabilitation program is more difficult until it becomes certain what the accused's punishment ultimately will be; so the commencement of successful rehabilitation may be delayed while awaiting the results of a second trial. Also, the military sentencing and correctional authorities may differ from their civilian counterparts in methodology and in goals; and these differences may complicate the rehabilitation process.
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> Further, we remarked:
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> The "practical reasons of dispatch" which have led to the military practice of joining all known offenses in a single trial also help support the conclusion that where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest, in turn, helps us provide a basis for finding service connection for the off-base offenses.

Id. at 8.

Admittedly, in the present case, the offenses in Juneau are not "related" in time or place to those at Governors Island. On the other hand, they are of a

similar type and probably result from the same underlying motive or predisposition. Indeed, the similarity is such that, even if not before the court-martial for trial, the offenses in Alaska might be admissible under Mil.R. Evid. 404(b); and apparently, if the military judge's ruling is upheld, the Government will seek to use evidence of these offenses pursuant to that rule. Moreover, the method of rehabilitation employed would seem to be the same for the Alaska and the Governors Island offenses; and the likelihood of successful rehabilitation for the latter offenses would be small if the others were still pending for trial. From the standpoint of the two girls and their parents, there also is the advantage that the trial by court-martial at Governors Island will promptly dispose of the offenses allegedly committed in Alaska and will eliminate the possibility that on two occasions, rather than one, the victims will have to give "public testimony about a humiliating and degrading experience such as was involved here." *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). Under these circumstances, there exists here "a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay," and "this interest, in turn, helps provide a basis for finding service connection for the off-base offenses."

When we consider the continuing effects of appellant's off-base misconduct on the servicemember fathers of the two victims, the resulting effect on other Coast Guardsmen and on that service, the unfeasibility of an Alaskan prosecution, and the importance to the Coast Guard of disposing of all the offenses promptly in a single trial, we are convinced that service-connection exists and that the court below correctly reversed the military judge.

III

The petition for grant of review is granted. The motion for a stay is denied, and the motion to strike the affidavits is dismissed as moot.

The decision of the United States Coast Guard Court of Military Review is affirmed.

Judge COX concurs.

APPENDIX B

UNITED STATES COAST GUARD COURT OF MILITARY REVIEW
Washington, DC

UNITED STATES

v.

RICHARD SOLORIO
YEOMAN FIRST CLASS, U. S. COAST GUARD

Misc. Docket 004-85

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24 SEPTEMBER 1985

LCDR ROBERT E. BRUCE, USCG
APPELLATE DEFENSE COUNSEL
LCDR THOMAS L. DONLON, USCG
APPELLATE GOVERNMENT COUNSEL

OPINION OF THE COURT ON APPEAL OF THE GOVERNMENT FROM DISMISSAL OF CHARGES AND SPECIFICATIONS BY THE TRIAL JUDGE

BAUM, Chief Judge:

This is the Coast Guard's first action under Article 62, UCMJ, 10 USC § 862, which became effective August 1, 1984 and authorizes appeals by the Government from certain orders and rulings of a military judge not amounting to findings of not guilty. The ruling from which the Government has appealed grants defense counsel's motion to dismiss various charges and specifications for lack of jurisdiction. In so ruling, the trial judge applied to the facts the doctrine of "service connection," first proclaimed in *O'Callahan* v. *Parker*,

395 U.S. 258, 89 S. Ct. 1683 (1969) and amplified later in *Relford* v. *Commandant,* 401 U.S. 355, 91 S. Ct. 649 (1971) and *Schlessinger* v. *Councilman,* 420 U.S. 738, 95 S. Ct. 1300 (1975).

In *O'Callahan* v. *Parker, supra,* the U. S. Supreme Court, analyzed the reach of court-martial jurisdiction for offenses committed within United States territorial limits during peacetime and rejected the Government-advanced argument that liability for trial by court-martial is simply "a question of 'status'–'whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.' " 395 U.S. 267, 89 S. Ct. 1688. Instead, the Court said, "that is merely the beginning of the inquiry, not its end. 'Status' is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." Id. The Court went on to say, "the crime to be under military jurisdiction must be service connected. . . ." 395 U.S. 272, 89 S. Ct. 1690. Since then, for offenses during peacetime committed inside the territorial limits of the United States, both person and offense must be found to be within a court-martial's ambit in order for there to be a trial. In making such determinations, military courts to this day have repeatedly faced the question of what must be shown to establish "service connection." *See generally* the recent cases of *U.S.* v. *Griffin,* ____MJ____, ACM 24752 (AFCMR 5 September 1985); *U.S.* v. *Wilson,* Misc Dkt No. 85-08, (NMCMR 20 August 1985); *U.S.* v. *Benedict,* ____MJ____, ACM 24444 (AFCMR 14 August 1985); *U.S.* v. *Roa,* 20 MJ 867 (AFCMR 1985); *U.S.* v. *Kyles,* 20 MJ 571 (NMCMR 1985); *U.S.* v. *Holman,* 19 MJ 784 (ACMR 1984), *U.S.* v. *Wojciechowski,* 19 MJ 577 (NMCMR 1984).

Assistance in making that judgment was provided in 1971 in *Relford* v. *Commandant, supra,* when the Supreme Court established a guideline for finding "service connection" and in the process carved out a service connected area where courts-martial are always appropriate, holding, "that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial." 401 U.S., 369, 91 S. Ct. 657.

All the dismissed offenses in the instant case were violations of the security of persons but they were not committed within or at the geographical boundary of a military post. They allegedly occurred in the accused's privately owned home eleven miles from the Federal Office Buidling in downtown Juneau, Alaska where he worked on the staff of Commander, Seventeenth Coast Guard District. The charges and specifications allege various offenses against two young girls, including attempted rape; indecent and simple assaults; lascivious acts; and indecent liberties. The alleged victims were between the ages of ten and twelve during the period when the offenses supposedly occurred. The fathers of these girls were also active duty members of the Coast Guard and they, too, were assigned to the Coast Guard District Commander's staff. They, also, lived in civilian housing, one next door to the accused and his family and the other a half mile away, there being no government quarters in Juneau for anyone other than the District Commander.[1]

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[1] We judicially note that in Juneau there was no base or post for Coast Guard personnel of the kind referred to in *O'Callahan* and *Relford, supra,* that is, a large military controlled enclave where many service personnel live and work. The closest equivalent in Juneau was the Coast Guard Station, a small 1.3 acre facility with a complement of fourteen enlisted persons, without berthing and messing accommodations, but including, at the time in question: a pier for two boats and a Coast Guard buoy tender; one building for watchstanders which also housed a small exchange and two recreational clubs; and one open structure utilized as a covered work area for boat crews. Over two hundred Coast Guard military personnel were assigned to the District Commander's staff, occupying four of the nine floors of the Juneau Federal Office Building, where Federal court spaces, along with offices for various other Federal civilian agencies, were also located. The Coast Guard Marine Safety Office situated in a building adjacent to the Federal Office Building had a military allowance of seventeen persons. With the possible exception of some of the complement of six officers and forty-nine enlisted personnel on the buoy tender, all of the approximately three hundred Coast Guard military personnel in Juneau lived in the civilian community. This Coast Guard presence in Juneau is far less than the military concentrations found at typical installations of the other services, but not an insignificant number by Coast Guard standards, despite the lack of a base or post to house them.

A friendship had grown between the accused and both of the other families, grounded in one case, on the common sporting interests of bowling and basketball, and, in the other, on the proximity of living next door. The alleged victims came to the accused's home on a regular basis to visit with his two sons. Both girls at one time played on a soccer team coached by the accused and they also bowled in a league in which the accused was active. During their stay in Juneau, the girls displayed behavioral changes that concerned and perplexed their parents and, as a result, counseling was commenced for one girl. Whatever was causing such changes remained undetermined at the time, and the girls never made known the acts allegedly committed by the accused while they were in Juneau. It was not until all parties had been permanently transferred to different Coast Guard duty stations outside Alaska that any offenses came to light. They were first revealed when one of the girls confided in a school counselor. After that, the mat-

ter was reported to Coast Guard authorities and an investigation was commenced. Initially, the other girl, who happened to be the one who received counseling in Juneau, refused to discuss the events with her parents. She continued to be silent with them, until she and her parents went to New York for the Article 32, UCMJ investigation hearing which had been convened to determine whether a general court-martial was warranted. Both of the girls and their parents are now undergoing counseling/therapy as a result of the matters alleged to have occurred.

The accused is assigned to Commander, Coast Guard Group New York at Governors Island, New York, a Coast Guard base, where he lives in Government quarters and where the instant general court-martial was convened by the senior Coast Guard officer at Governors Island, Commander, Third Coast Guard District. In addition to the charges which have been dismissed, eight similar offenses, involving two other minor dependent daughters of Coast Guardsmen, were also referred to trial. These remaining offenses are alleged to have occurred in quarters on base at Governors Island after the accused's transfer from Juneau. The Assistant District Attorney, Criminal Division/First Judicial District, State of Alaska, writing for the Attorney General, has stated in appellate exhibit IX of the record, "that the Department of Law, Criminal Division, State of Alaska, will defer the prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutional arm of the Coast Guard," citing as one of the reasons for this action, the expense and difficulty involved in investigating and prosecuting a case where the alleged victims have been transferred from Alaska.

With this factual setting, we now must determine whether or not the judge was correct in dismissing the charges. In answering that question, two recent Court

of Military Review decisions bear consideration. In *U.S.* v. *Wilson, supra,* the Navy-Marine Corps Court of Military Review also faced an appeal by the Government from a military judge's ruling dismissing charges for lack of subject matter jurisdiction. In that case, the Court reversed the trial judge, finding there to be "service connection" in the off-base forcible sodomy and assault by a sailor on his active duty Army wife. Distinguishing features of fact prevent us from relying on the action of that Court, but we do agree with the emphasis placed by the Court on finding a distinct and greater interest in prosecuting by the military when compared with the interest of civilian authorities. The Air Force case of *U.S.* v. *Benedict, supra,* is closer to ours factually, involving, as it did, off-base indecent acts with a ten year old daughter of Air Force active duty parents, which the civilian authorities passed to the military for prosecution. The only significant difference between *Benedict,* and our case is the posture of review. In *Benedict,* the trial judge found "service connection" and the case was before the Air Force Court in the normal course of review under Article 66, UCMJ, permitting factual determinations at the appellate level, if necessary. On the other hand, we are bound by certain facts found at the trial level unless we determine that the judge's findings were incorrect as a matter of law.[2]

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[2] Article 62(b), UCMJ, 10 USC § 862(b), provides that on appeal by the United States of an order or ruling of the military judge, "the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (Article 66(c))." This latter article authorizes Courts of Military Review, in the course of acting on findings of guilty and sentences, to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. . . ." Article 66(c), UCMJ.

With respect to the legal issue of service connection, the Court in *Benedict* rejected, as controlling, a series of early decisions by the Court of Military Appeals that found no "service connection" for off-base sexual offenses involving civilian dependents of military personnel. *U.S.* v. *McGonigal,* 19 USCMA 94, 41 CMR 94 (1969); *U.S.* v. *Shockley,* 18 USCMA 610, 40 CMR 322 (1969); *U.S.* v. *Henderson,* 18 USCMA 601, 40 CMR 313 (1969). The Air Force Court based its rejection of these cases on more recent Court of Military Appeals and Courts of Military Review opinions which it saw as dramatically redefining the scope and parameter of military jurisdiction. *Murray* v. *Halderman,* 16 MJ 74 (CMA 1983); *U.S.* v. *Lockwood,* 15 MJ 1 (CMA 1983); *U.S.* v. *Trottier,* 9 MJ 337 (CMA 1980); *U.S.* v. *Shorte,* 18 MJ 518 (AFCMR 1984) affirmed by USCMA summary disposition on August 13, 1985; *U.S.* v. *Roa, supra.* We agree with the Air Force Court that these cases support an expanded view of court-martial jurisdiction. Howev[illegible], we believe it useful to turn, again, to the basic guidance provided by the Supreme Court in *Relford.*

In addition to the 12 elements inherent in the *O'Callahan* holding, the Court in *Relford, supra,* stressed nine other important criteria for consideration in making "service connection" determinations on a case by case basis. Quoting from *Relford,* with footnotes and citations ommitted, those nine factors are:

> (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave.
> (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order.

> (c) The impact and adverse effect that a crime committed against a person or property on military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.
> (d) The conviction that Article I, § 8, Cl. 14, vesting in the Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman–offender and turn him over to the civil authorities. The term "Regulation" itself implies, for those appropriate cases, the power to try and to punish.
> (e) The distinct possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community.
> (f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.
> (g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. The comment from Winthrop, supra, [W. Winthrop, Military Law and Precedents (2d ed. 1896, 1920 Reprint] at 724:
>
> > "Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower * * * inasmuch as they directly affect military relations and prejudice military disci-

> pline, may properly be – as they frequently have been – the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses." (Footnotes omitted.)

cited both by the Court in *O'Callahan*, 395 U.S., at 274 n. 19, 89 S. Ct., at 1691 and by the dissent at 278-279, 89 S. Ct., at 1693-1694, certainly so indicates and even goes so far as to include an offense against a civilian committed "near" a military post.

> (h) The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law.
>
> (i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post.

401 U.S. 367-369, 91 S. Ct. 656, 657.

At the completion of its analysis, the Court in *Relford* said:

> "We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time."

401 U.S. 369, 91 S. Ct. 657.

Thus, the question for this Court is whether the facts surrounding the instant offenses, lying somewhere between *O'Callahan* and *Relford*, provide sufficient *indicia* of "service connection" to allow trial by court-martial. The Air Force with similar facts, as noted, said, "yes," in *U.S.* v. *Benedict, supra.* The military judge here said, "no," finding facts which indicated to him a lack of service connection. Now, we must determine whether his conclusion was correct or incorrect as a matter of law. In approaching this task, we must look carefully at the facts he found and, in the process, apply the *Relford* yardstick. Also of help in this regard is a statement by the Supreme Court in the later case of *Schlesinger* v. *Councilman, supra,* which placed particular emphasis on certain of the *Relford* factors. In that case the Court said:

> [The service connection] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred.

420 U.S. 760, 95 S. Ct. 1314.

In evaluating the judge's findings of fact, as stated earlier, we are not free to exercise our normal fact finding authority. Instead, we are limited to acting only "with respect to matters of law." This, of course, is the same standard of review applicable to the U.S. Court of Military Appeals in every case considered by that Court, since Article 67(d), UCMJ says "The Court of Military Appeals shall act only with respect to matters of law."

Accordingly, that Court's approach to issues in which questions of fact are integral and must, of necessity, be evaluated, should apply to this Court's process of review for Government appeals. In that regard, the standard set forth in *U.S.* v. *Middleton,* 10 MJ 123 (CMA 1981), while relating to the facts surrounding an issue of search and seizure and the question whether an accused had consented to the search, seems particularly pertinent to the evaluation we must make of the facts relating to the legal conclusion of "service connection." In *Middleton,* the Court said:

> Whether consent was given must "be determined from the totality of all the circumstances." 412 U.S. at 227, 93 S. Ct. at 2047. Frequently, it poses issues of fact; but the ultimate question of the existence of consent involves application of a legal standard and so is subject to appellate review. See *United States* v. *Faruolo,* 506 F.2d 490, 496 (2nd Cir. 1974) (Newman, Dist. J., concurring). Thus, while always viewing the facts in the light most favorable to the Government, [the prevailing party at the trial level] *see United States* v. *Lowry,* 2 MJ 55 (C.M.A. 1976), this Court has appropriately concerned itself with whether those facts in any given case support the conclusion of consent. *See, e.g., United States* v. *Gillis,* 8 MJ 118 (C.M.A. 1979); *United States* v. *Aros,* 8 MJ 121 (C.M.A. 1979); *United States* v. *Mayton,* 1 MJ 171 (C.M.A. 1975); *United States* v. *Vasquez,* 22 U.S.C.M.A. 492, 47 C.M.R. 793 (1973). Nonetheless, to give due deference to the trial bench, a conclusion of consent reached below should not be disturbed unless it is unsupported by the evidence of record or was clearly erroneous. *United States* v. *Williams,* 604 F.2d 1102 (8th Cir. 1979); *United States* v. *McCaleb, supra; United States* v. *Tolias,* 548 F.2d 277 (9th Cir. 1977); *United States* v. *Griffin,* 530 F.2d 739 (7th Cir. 1976). *See United States* v. *Vasquez, supra.*

Accordingly, we will give due deference to the findings of the trial judge, viewing the facts and evidence in a light most favorable to the accused who prevailed at trial, and will not disturb the judge's findings or "service connection" conclusion unless unsupported by the evidence or clearly erroneous. Accord *U.S.* v. *Postle,* 20 MJ 632 (NMCMR 1985).

Based on the evidence considered, the judge at trial found as fact that there was "a *de minimus* military relationship between the accused and the military fathers of the victims." He concluded that their relationship was "founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships." The judge also included the following in his statement of "essential findings of fact":

> None of the alleged offenses posed a threat to any military installation. . . .
>
> * * * *
>
> There is no essential interest of the military in the security of person or property on post in this case.
>
> * * * *
>
> No issue challenges the Commander's responsibility and authority to maintain order.
>
> There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personnel assigned there, nor on military operations or missions. The impact apparent in this case, that is,

on the parents and the victims themselves is no different than that which would be produced by [a] civilian perpetrator.

There has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses. To the contrary, Appellate Exhibit X [a Coast Guard message reporting conviction and sentencing in Alaska State Courts of two Coast Guardsmen on charges of sexual abuse of minors] suggests that civil courts in Alaska have recently produced results highly satisfactory to the military in similar cases. . . .

* * * *

. . . .There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. . . . I acknowledge a certain amount of logic in the judicial economy argument put forth by the Government and that political or economic considerations may support exercise by this Court of jurisdiction. However, those factors along with all others have not demonstrated a superior military interest in handling these offenses. . . . The impact of the alleged offenses, primarily reflected in the testimony of the service member parents of the victims, is that which might be expected of the victim of any crime of a similar nature, and while that impact may manifest itself in the work situation of those members, it does not rise to the level to compel the exercise of Court-Martial jurisdiction in these circumstances. In this regard, I note the increased caution of [sic] the parents [of the] victims may now exercise over their children, the requirements for counseling, anxiety, and time away

from work for legal proceedings. These concerns would be the same whether the status of the offender were military or civilian. . . .

* * * *

. . . . In light of the facts as found and in particular the reach of the Coast Guard Family Advocacy Program, I find that the Coast Guard interest in deterring these offenses in not distinct from that of civilian society and is less than that of civilian society, and what little if any distinct military interest there may be, can be adequately vindicated in civilian courts.

The judge supplemented these findings later and in so doing said *inter alia:*

4. Crime has an impact. The impact is felt on the victim and on those close to the victim. It is also reflected in the greater society of which the victim and offender are a part. Impact may be direct or indirect. In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service connection. That indirect impact consists of servicemember-parents[']preoccupation with family situation affecting the members['] performance, some initial counselling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J. Good order, discipline, morale and welfare of servicemembers have not been directly impacted. Service reputation has not been adversely affected and those attributes of service reputation in a community which have been testified about, for example, credit worthiness, job stability for spouses, members['] and families['] access to community activities; would not be negatively impacted if these offenses were to come to light.

* * * *

6. The offenses alleged to have occurred in Alaska are significantly remote in time and place from those alleged to have occurred in New York.

In arriving at his findings, we believe the judge erred in several important respects. First, in finding that there has been no demonstrated impact of the offenses on morale and discipline in Juneau, he failed to properly take into account the changed circumstances resulting from the departure of all directly affected parties before the offenses became known. For the judge to base his decision on the observed effect, or lack thereof, in Juneau after the parties had left, rests the ultimate conclusion of whether jurisdiction is to be exercised on a distorted picture caused by military transfer. A more realistic reflection of the impact from such offenses could have been seen if the offenses had come to light while the accused, the victims and their families were still in Alaska. If impact on the command at Juneau is to be considered at all, it should be viewed from the perspective of the effect such offenses would have had if discovered at the time the fathers and the accused were assigned together on the staff of the District Commander. The offenses by their very nature contained within them the potential for a disrupting effect on good order and discipline on that staff. Accordingly, it was error for the judge to base his assessment of impact on the Juneau command solely on the observed effect after departure of all parties.

A more relevant finding in this area would pertain to the impact of these offenses on morale and discipline at Governors Island, where the accused is now stationed and living on base. The judge made no specific findings, however, with respect to the possible effect of the offenses on morale, good order and discipline within any command at Governors Island or on personnel under

the authority and responsibility of the convening authority, Commander, Third Coast Guard District. Instead, he found the Alaska offenses to be "significantly remote in time and place from those alleged to have occured in New York" and he concluded that none of the alleged Alaska offenses posed a threat to any military installation nor did they generate an essential military interest in the security of persons on post. Moreover, he found that, "[g]ood order, discipline, morale and welfare of servicemembers have not been directly impacted." With these conclusions, we must disagree. The offenses in Alaska were alleged to have occurred over a period of time up until June 30, 1984. The offenses in New York purportedly commenced as early as November 20, 1984. Characterization of the period between June and November as "significantly remote" is clearly erroneous. To the contrary, the asserted Alaska offenses were close enough in time and nature to those in New York to pose a real threat to the accused's military neighbors with young daughters. As such, they directly impacted upon good order, discipline, morale and welfare of servicemembers and their families. Furthermore, we believe, as a result and as a matter of law, the Coast Guard's interest in deterring these offenses is distinct from and greater than that of the Alaskan authorities and that the judge erred in finding to the contrary.

We also disagree with the judge's conclusion that the concern of the parents in this case "would be the same whether the status of the offender were military or civilian." Such a conclusion overlooked the possible unique and distinct effect from the discovery by the fathers that a fellow Coast Guardsman may have committed violative offenses, of the nature alleged, upon their daughters and the natural expectation of the fathers that those in positions of authority and respon-

sibility within the Coast Guard would take appropriate action to vindicate the outrage felt from such a grievous breach of faith by one shipmate towards another.

Finally, the judge's finding that "there has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the miltiary's disciplinary interest in prosecuting these offenses" is simply contrary to the evidence of record. Appellate exhibit IX, as indicated earlier, fully reflects that there is more than a potential lessened interest of the civil authorities; it documents an actual lessened interest because of the departure from Alaska of all of the interested parties. That is not to say that the appropriate civil authorities have no interest whatsoever in the case. In fact, through appellate exhibit XV, a stipulation of expected testimony of the assistant District Attorney who signed appellate exhibit IX, it is shown that their decision is subject to reconsideration. There is no assurance, however, that upon reconsideration the Alaskan authorities will decide to prosecute these offenses, even if the judge's dismissal for lack of military jurisdiction is allowed to stand upon final review. Appellate exhibit XV does not change the conclusion to be drawn from the current decision by Alaskan authorities deferring prosection to the Coast Guard, i.e., the Coast Guard's interest in vindicating its disciplinary authority within its own community in this instance is greater than the interest the civilian prosecutors in Alaska may have in this matter. The judge's reliance on appellate exhibit X for a contrary conclusion is misplaced. That exhibit merely reveals that in two other cases the civil authorities successfully prosecuted Coast Guard members in Alaska State Courts for sexual abuse of minors, without disclosing whether or not the accused and the witnesses were residing in Alaska at the time the offenses became known and without revealing what

other aspects of service connection may or may not have been present. In any event, every case must rest on its own facts. The two prosecutions noted in appellate exhibit X certainly demonstrate that the Alaskan Courts were open and available but that simply does not change the facts with respect to the State's diminished interest in the case presently before this Court. For this reason, we conclude that the judge's finding of fact concerning that interest is clearly erroneous.

For further evaluation of the judge's legal conclusion that there was no "service connection," we look now to the *Relford* criteria enumerated earlier. Viewed from the perspective of the Coast Guard Commander in Juneau, it is clear that factors (a), (c), and (i), would not apply literally to the offenses since these factors relate to base security and offenses committed on a base. On the other hand, factor (a) may apply literally to Commander, Third Coast Guard District's decision to refer all the charges to trial. He has a legitimate, essential and obvious interest in the security of persons on the military enclave at Governors Island, where the accused now lives. Looking strictly at the offenses when they occurred, however, we note that, while the alleged crimes were not committed on or at the boundary of a base, they were violations against persons associated with one particular Coast Guard command. A command is more than a physical place or property; it is an organization of people. The commander's responsibility and authority for maintaining good order within his command relates to people, without regard to the physical attributes and location of the command. Accordingly, if we were to substitute the term "command" for "post" or "base" everywhere that those words appear in the nine *Relford* criteria, other than the quotes from Winthrop in factor (g), and the phrase "associated with a military command" for the phrases "on a military enclave," "on a

military base," and "on the post" in (a), (c), and (i) respectively, it would then appear that all nine *Relford* factors would be relevant to the offenses when they were committed in Juneau. Such a substitution would seem appropriate in light of the unique facts presented here – a military presence without the traditional base – and in light of the language and thrust of the remaining six *Relford* factors, particularly factor (g) with its reference to categories of persons who accompany the military. It is unnecessary to make this substitution, however, which we leave for consideration to other courts and other opinions, because we believe the remaining criteria provide reason enough to conclude that there was service connection in this case as a matter of law.

In light of the earlier quoted statement from *Schlesinger* v. *Councilman, supra,* we believe this Court is justified in placing overriding importance on *Relford* factors (b) and (e), with their emphasis on the responsibility and authority of a military commander for maintenance of order in the command and the need to have court-martial jurisdiction to support that authority and responsibility when there is the possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern or capacity for vindicating that authority. Here, the officer who convened this court-martial was confronted with allegations of sexual offenses against four minor Coast Guard dependents. The offenses against two of the girls occurred on a base under the authority of Commander, Third Coast Guard District, thereby, bringing into play all of the *Relford* factors that validate his authority to maintain good order, discipline, and morale within his command through the exercise of court-martial jurisdiction. The similarity of the alleged on-base Governors Island offenses and the alleged off-base Juneau offenses, when viewed together, presents a pattern of behavior which

poses a real threat to families now living in close proximity to the offender on-base at Governors Island. That threat and the impact it has upon morale, good order and discipline on the base challenges the responsibility and authority of the military commander for maintenance of order in his command. Thus, we disagree as a matter of law, with the judge's statement that in this case, "No issue challenges the Commander's responsibility and authority to maintain order," as well as the judge's conclusion that the factors presented in this case do not demonstrate "a superior military interest in handling these offenses," and his finding that there was "no direct impact on the service." The military commander in the situation encountered here has a compelling interest in determining as soon as possible whether the accused is guilty or not of *all* the alleged offenses and, if guilty, of ensuring that the proper forum takes appropriate action.[3] The only forum that can try all of these offenses is a court-martial. Alaskan courts have no jurisdiction over the Governors Island offenses. Moreover, the Commander with authority over that base could justifiably conclude that the interest of authorities in Alaska is less than complete with respect to the offenses committed there. Even without a letter so indicating, such a conclusion could be drawn easily enough from the knowledge that the accused and his alleged victims are no longer members of the Alaskan community. The paramount interest of the Coast Guard is clear from the fact that all of the parties were and still

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[3] See also RCM 203, MCM, 1984, where in subsection (b) of the discussion pertaining to that rule it is stated that, "where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest helps provide a basis for finding service-connection for the off-base offenses."

are members of the Coast Guard community. Commander, Third Coast Guard District, as third ranking officer in the Coast Guard,[4] is in a position to safeguard the overall interests of the Coast Guard in this matter, as well as the unique concerns of his particular command at Governors Island. For all of these reasons, we have concluded as a matter of law that there is "service connection" with its resultant court-martial jurisdiction.

In arriving at this conclusion, we have accepted all facts found by the judge, not directly in conflict with our holding and not expressly rejected as unsupported or erroneous. As noted, however, the judge failed to make findings concerning the impact of the offenses on morale, good order, and discipline at Governors Island. In this regard, we believe that the impact is self evident from the nature of the offenses, the relationships of the parties and the accepted facts of record.

Our ultimate legal conclusion, we reiterate, is based on the following determinative factors: the common thread among all offenses of victims who are young dependent daughters accompanying and residing with their Coast Guard parents; the violative nature of the offenses which invokes the responsibility and authority of the military commander for maintaining security, order, morale and discipline within his command; and the less than complete interest, concern and capacity of civil authorities in vindicating the military commander's responsibility and authority in this regard. These factors impel us to conclude that the offenses are "service connected" and that the judge's ruling dismissing for want of jurisdiction must be reversed.

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[4] We judicially note that, Commander, Third Coast Guard District, VADM Paul A. Yost, USCG, is the third senior officer in the Coast Guard, ranking directly after the Commandant and the Vice Commandant of the U.S. Coast Guard.

Having reached this conclusion, the Government's appeal is resolved. In so doing, we have treated certain supplemental findings of fact as validly entered into the record by the judge. The judge, after dismissing the charges and announcing his essential findings of fact in open session at Governors Island, New York, on June 4, 1985 also stated, "Subject to amendment and correction at the time of authentication those should constitute the essential findings of fact on that motion." Later, on June 20, 1985 at Washington, D.C., he signed a document denominated "Supplemental Essential Findings of Fact" and attached it to the record of trial sometime before authenticating the record on June 29, 1985. A copy was then provided to the trial counsel and defense counsel. Appellate Government Counsel challenges this document as not a proper part of the record of trial because it memorializes an invalid act outside a session of court and also that RCM 908, MCM, 1984, precludes further sessions of court with respect to the judge's ruling, after written notice of appeal is filed. In support of its argument that further proceedings were foreclosed, the Government cites *U.S.* v. *Browers*, 20 MJ 542 (ACMR 1985), a case where the Army Court of Military Review voided a finding of not guilty made by the judge after notice of appeal by the Government had been filed. We do not believe that the supplemental findings of fact in this case rise to the level of prohibited proceedings as found in *Browers*. Furthermore, we see no requirement for presenting the findings in open session as long as all parties are provided copies in a timely fashion. Accordingly, we do not agree with the Government that the supplemental findings in this case are invalid. We do agree, however, that adding such afterthoughts to the record can impede the expeditious filing by the Government of its appeal and brief. That did not happen in this case, as the Government filed its pleadings in a full and

timely manner. In an appropriate case, however, late additional findings of fact may justify granting an enlargement of time for filing of the appeal by the Government, or other appropriate action.

The ruling of the military judge dismissing charges and specifications alleging offenses in Juneau, Alaska is reversed and those offenses are reinstated. The record is returned in order that the trial may proceed with the charges and specifications thus restored, along with the other charges and specifications that were not affected by the judge's ruling.

Judges Burgess, Lynn and Grace concur.

Judge Bridgman concurring in part and dissenting in part.

I agree with the Court's holding that the trial judge erred, as a matter of law, in determining the impact of this offense on the morale and discipline of the Coast Guard in Juneau and that a determination should have been made as to the impact, if any, on the accused's present command and the Coast Guard community as a whole. In addition to the matters discussed in the majority opinion, I note that the judge's essential findings may have been based on an erroneous standard, where the judge stated "the impact of the alleged offenses . . . does not rise to the level to *compel* the exercise of Court-Martial jurisdiction in these circumstances." [R-132] (emphasis added).[1] I also agree that the trial judge erred, as a matter of law, in his finding that there was no evidence suggesting a "lessened interest, concern or capacity" of the civil court in Alaska in the prosecution of these offenses.

[1] This may not accurately reflect the standard applied. In the supplemental essential findings the impact was found "not *sufficient* to create service connection" [page 2] (emphasis added).

Where I depart from the majority is the holding that there was "service connection" and therefore jurisdiction, in this case, as a matter of law. As noted by the majority, the judge made no specific findings with respect to the possible effect of the offenses at Governors Island or on personnel under the authority and responsibility of the convening authority. Even if this case were before us for review under Article 66(c), UCMJ, 10 USC § 866(c), I would hesitate to determine that jurisidiction exists in light of this omission. Although the Court of Military Appeals has sanctioned drawing reasonable inferences with respect to factual matters not fully developed in the record of trial to support court-martial jurisdiction it has done so where jurisdiction was challenged for the first time at the appellate level. *U.S.* v. *Lockwood,* 15 MJ 1 (CMA 1983). Since this case is before us for review under Article 62(b) UCMJ, 10 USC § 862(b), I do not believe we are empowered to cure an omission from the essential findings of the trial judge. Further, I would distinguish cases such as *U.S.* v. *Burris,* 20 MJ 707 (ACMR 1985) and *U.S.* v. *Poduszczak,* 20 MJ 627 (ACMR 1985), where determination that the trial judge erred, as a matter of law, necessarily compelled a contrary finding of fact.

I am concerned that, in exceeding that which is necessary to dispose of the Government's appeal, we have lessened the requirement "that the Government fulfill its obligation under the law to meet the letter of the law." *U.S.* v. *Trottier,* 9 MJ 337 (CMA 1980), (concurring opinion at 353). Accordingly, while I would grant relief to the Government and remand the charges to the trial court, I would do so without prejudice to the

accused's right to renew his attack at the trial level and upon any further appellate review of the case. *Murray* v. *Haldeman,* 16 MJ 74 (CMA 1983).

For the Court

/s/ DONNIE HARRIS
DONNIE HARRIS
YN2, U.S. Coast Guard
Clerk of the Court

APPENDIX C

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984)

R.C.M. 203

DISCUSSION

(a) *In general.* Courts-martial have power to try any offense under the code except when prohibited from doing so by the Constitution. (Jurisdiction over certain offenses and individuals may be affected by Article 3; *see* R.C.M. 202.) The major constitutional limitation on the subject-matter jurisdiction of courts-martial was established by the Supreme Court of the United States in *O'Callahan v. Parker*, 395 U.S. 258 (1969), which held that an offense under the code may not be tried by court-martial unless it is "service-connected." Later decisions by the Supreme Court, the Court of Military Appeals, and other courts have established standards for applying the service-connection rule, as well as certain exceptions to it. Because each case depends on its own facts, and because these rules are subject to continuing interpretation, careful attention must be paid to service-connection in every case. The remainder of this discussion provides guidance concerning service-connection based on judicial decisions.

(b) *Pleading and proof.* The prosecution should plead the facts establishing jurisdiction (*see* R.C.M. 307(c)(3). Discussion (F)). If the issue is raised, the prosecution must prove the disputed facts necessary to establish jurisdiction over the offense. *See* R.C.M. 907(b)(1)(A). Jurisdiction must exist over each offense. The fact that some offenses with which the accused is charged are service-connected does not necessarily establish juris-

diction over others, even if they are of a similar or related nature. However, where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest helps provide a basis for finding service-connection for the off-base offenses.

(c) *Determining service-connection.*

(1) *In general.* In *Relford v. Commandant,* 401 U.S. 355 (1971), the Supreme Court identified 12 factors which may be considered in deciding service-connection. The factors are–

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offenses being among those traditionally prosecuted in civilian courts.

These factors are not exhaustive. The Supreme Court also described nine additional considerations in *Relford*:

> (1) the essential and obvious interest of the military in the security of persons and of property on the military enclave; (2) the responsibility of the military commander for maintenance of order in the command and the commander's authority to maintain that order; (3) the impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon the morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operation and the military mission; (4) Article I, section 8, clause 14 of the Constitution of the United States, vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a servicemember-offender and turn that person over to the civil authorities; (5) the distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community; (6) the presence of factors such as geographical and military relationships which have important significance in favor of service-connection; (7) historically, a crime against the person of one associated with the post was subject even to the General Article; (8) the misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law; (9) the inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or betwen a servicemember's duty and off-duty activities and hours on the post. In addition, the effect

> of the offense on the reputation and morale of the Armed Services is an appropriate consideration in determining service-connection.

The test is not simply a numerical tally of the presence or absence of these or other factors. Instead, the factors identify circumstances which may tend to weigh for or against service-connection, depending on the facts of each case. Thus, certain factors will tend to weigh more heavily than others in given situations. This balancing test has been described by the Supreme Court:

> [The] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts.

Schlesinger v. Councilman, 420 U.S. 738, 760 (1975).

(2) *Military offenses.* Military offenses, such as unauthorized absence, disrespect offenses, and disobedience of superiors, are always service-connected.

(3) *Offenses on a military installation.* Virtually all offenses which occur on a military base, post, or other installation are service-connected. Similarly, offenses aboard a military vessel or aircraft are service-connected. If an essential part of the offense occurs on a military installation, service-connection exists even though the remainder of the offense took place off base. However, on-base preparation to commit an offense or introduction onto a military installation of the fruits or instruments of a crime completed off base may not necessarily be sufficent to prove service-connection over an off-base offense. An offense which directly threatens the security of an installation may be service-connected even though it occurs off base. When an offense is committed near a military installation, the

proximity may support a finding of service-connection, as when it injures relationships between the military and civilian communities and makes it more difficult for servicemembers to receive local support.

(4) *Drug offenses.* Almost every involvement of service personnel with the commerce in drugs, including use, possession, and distribution, is service-connected, regardless of location. However, examples of situations in which drug involvement by a servicemember which after *Relford* analysis might not be service-connected include the use of marijuana by a servicemember on a lengthy leave away from the military, or off-base distribution by a servicemember of a small amount of illegal drugs to a civilian for personal use.

(5) *Offenses involving military status and the flouting of military authority.* The fact that the victim of an offense is a servicemember or that the accused used a military identification card may establish service-connection, especially in conjunction with other facts in a case. If the accused's status, either as a servicemember generally, or as the occupant of a specific position, is of central importance to the criminal activity, as where it is crucial in enabling the accused to commit the crime, service-connection will normally exist. The fact that the accused is an officer or military policeman or was in uniform when the offense was committed does not necessarily establish service-connection, although such circumstances may tend to support a finding of service-connection in conjunction with other facts.

(6) During a declared war, or a period of hostilities as a result of which Congress is unable to meet, virtually all offenses would be service-connected.

(d) *Exceptions to the service-connection requirement.*

(1) *The overseas exception.* Offenses which are committed outside the territorial limits of the United States and its possessions, and which are not subject to trial in

the civilian courts of the United States, need not be service-connected to be tried by court-martial. This exception depends on the location of the commission of the offense, not on the location of the trial. Note that the overseas exception does not apply to all offenses committed abroad, for some criminal statutes of the United States apply to its citizens abroad. The offense must be service-connected in this case because the offense may also be tried in a civilian court of the United States. The fact that the offense occurred overseas may be a factor tending to establish service connection, however, even if potentially subject to trial in Federal civilian court.

(2) *The petty offenses exception.* Petty offenses may be tried by court-martial whether or not they are service-connected. An offense is petty if the maximum confinement which may be adjudged is 6 months or less and no punitive discharge is authorized.

APPENDIX D

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984)

ANALYSIS

Rule 203. Jurisdiction over the offense

This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses. Since the constitutional limits of subject-matter jurisdiction are matters of judicial interpretation, specific rules are of limited value and may unnecessarily restrict jurisdiction more than is constitutionally required. Specific standards derived from current case law are treated in the discussion.

The discussion begins with a brief description of the rule under *O'Callahan v. Parker*, 395 U.S. 258 (1969). It also describes the requirements established in *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977) to plead and prove jurisdiction. *See also* R.C.M. 907(b)(1)(A). The last three sentences in subsection (b) of the discussion are based on *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). The remainder of the discussion reflects the Working Group's analysis of the application of service-connection as currently construed in judicial decisions. It is not intended as endorsement or criticism of that construction.

Subsection (c) of the discussion lists the *Relford* factors, which are starting points in service-connection analysis, although the nine additional considerations in *Relford* are also significant. These factors are not exhaustive. *United States v. Lockwood, supra. See also United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980).

Relford itself establishes the basis for (c)(2) and (c)(3) of the discussion. It has never been seriously contended that purely military offenses are not service-connected per se. *See Relford* factor number 12. Decisions uniformly have held that offenses committed on a military installation are service-connected. *See, e.g., United States v. Hedlund, supra; United States v. Daniels,* 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). *See Relford* factors 2, 3, 10, and 11. As to the third sentence in (c)(3), *see United States v. Seivers,* 8 M.J. 63 (C.M.A. 1979); *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *Harkcom v. Parker*, 439 F.2d 265 (3d Cir. 1971). With respect to the fourth sentence of (c)(3), *see United States v. Hedlund, supra; United States v. Riehle*, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969). *But cf. United States v. Lockwood, supra.* Although much of the reasoning in *United States v. McCarthy,* 2 M.J. 26 (C.M.A. 1976) has been repudiated by *United States v. Trottier, supra*, the holding of *McCarthy* still appears to support the penultimate sentence in (c)(3). *See also United States v. Lockwood, supra; United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977). The last sentence is based on *United States v. Lockwood, supra.*

The discussion of drug offenses in (c)(4) is taken from *United States v. Trottier, supra.*

As to (c)(5), the first sentence is based on *United States v. Lockwood, supra.* Whether the military status of the victim or the accused's use of a military identification card can independently support service-connection is not established by the holding in *Lockwood.* The second sentence is based on *United States v. Whatley,* 5 M.J. 39 (C.M.A. 1978); *United States v. Moore,* 1 M.J. 448 (C.M.A. 1976). The last sentence is based on *United States v. Conn, supra; United States v. Borys,* 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (officer status of

accused does not establish service-connection under Article 134) (note: service-connection of Article 133 offenses has not been judicially determined); *United States v. Saulter*, 5 M.J. 281 (C.M.A. 1978; *United States v. Conn, supra* (fact that accused was military policeman did not establish service-connection); *United States v. Armes,* 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969) (wearing uniform during commission of offense does not establish service-connection).

Subsection (c)(6) of the discussion indicates that virtually all offenses by servicemembers in time of declared war are service-connected. There is little case authority on this point. The issue was apparently not addressed during the conflict in Vietnam; of course, the overseas exception provided jurisdiction over offenses committed in the theater of hostilities. The emphasis in *O'Callahan* on the fact that the offenses occurred in peacetime (*see Relford* factor number 5) strongly suggests a different balance in time of war. Furthermore, in *Warner v. Flemings,* a companion case decided with *Gosa v. Mayden*, 413 U.S. 665 (1973), Justice Douglas and Stewart concurred in the result in upholding Flemings' court-martial conviction for stealing an automobile while off post and absent without authority in 1944, on grounds that such an offense, during a congressionally declared war, is service-connected. The other Justices did not reach this question. Assigning *Relford* factor number 5 such extensive, indeed controlling, weight during time of declared war is appropriate in view of the need for broad and clear jurisdictional lines in such a period.

Subsection (d) of the discussion lists recognized exceptions to the service-connection requirement. The overseas exception was first recognized in *United States v. Weinstein*, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969). *See also United States v. Keaton*, 19 U.S.C.M.A. 64, 41

C.M.R. 64 (1969). The overseas exception flows from *O'Callahan's* basic premise: that the service-connection requirement is necessary to protect the constitutional right of service members to indictment by grand jury and trial by jury. While this premise might not be evident from a reading of *O'Callahan* alone, the Supreme Court subsequently confirmed that this was the basis of the *O'Callahan* rule. *See Gosa v. Mayden, supra* at 677. Since normally no civilian court in which the accused would have those rights is available in the foreign setting, the service-connection limitation does not apply.

The situs of the offense, not the trial, determines whether the exception may apply. *United States v. Newvine*, 23 U.S.C.M.A. 208, 48 C.M.R. 960 (1974); *United States v. Bowers*, 47 C.M.R. 516 (A.C.M.R. 1973). The last sentence in the discussion of the overseas exception is based on *United States v. Black*, 1 M.J. 340 (C.M.A. 1976). *See also United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977); *United States v. Lazzaro*, 2 M.J. 76 (C.M.A. 1976). Some Federal courts have suggested that the existence of court-martial jurisdiction over an overseas offense does not depend solely on the fact that the offense is not cognizable in the United States civilian courts. *See Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971). *See also United States v. King*, 6 M.J. 553 (A.C.M.R. 1978), *pet. denied*, 6 M.J. 290 (1979).

Several Federal courts which have addressed this issue have also held that the foreign situs of a trial is sufficient to support court-martial jurisdiction, although the rationale for this result has not been uniform. *See, e.g., Williams v. Froehlke*, 490 F.2d 998 (2d Cir. 1974); *Wimberly v. Laird*, 472 F.2d 923 (7th Cir.), *cert. denied*, 413 U.S. 921 (1973); *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl.), *cert. denied*, 400 U.S. 849 (1970); *Bell v. Clark*, 308 F.Supp. 384 (E.D. Va. 1970), *aff'd*,

437 F.2d 200 (4th Cir. 1971). As several of these decisions recognize, the foreign situs of an offense is a factor weighing heavily in favor of service-connection even without an exception for overseas offenses. *See Relford* factors 4 and 8. The logistical difficulties, the disruptive effect on military activities, the delays in disposing of offenses, and the need for an armed force in a foreign country to control its own members all militate toward service-connection for offenses committed abroad. Another consideration, often cited by the courts, is the likelihood that if the service-connection rule were applied overseas as it is in the United States, the practical effect would be far more frequent exercise of jurisdiction by host nations, thus depriving the individual of constitutional protections the rule is designed to protect.

The petty offenses exception rests on a similar doctrinal foundation as the overseas exception. Because there is no constitutional right to indictment by grand jury or trial by jury for petty offenses (*see Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Duke v. United States*, 301 U.S. 492 (1937)), the service-connection requirement does not apply to them. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). Under *Baldwin v. New York, supra*, a petty offense is one in which the maximum sentence is six months confinement or less. Any time a punitive discharge is included in the maximum punishment, the offense is not petty. *See United States v. Smith*, 9 M.J. 359, 360 n. 1 (C.M.A. 1980); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962).

Sharkey relied on the maximum punishment under the table of maximum punishments in determining whether an offense is petty. It is the view of the Working Group that offenses tried by summary courts-martial and special courts-martial at which no punitive

discharge may be adjudged are "petty offenses" for purposes of *O'Callahan* in view of the jurisdictional limitations of such courts. Whether the jurisdictional limits of a summary or such special court-martial makes an offense referred to such a court-martial petty has not been judicially determined.

APPENDIX E

RECORD OF TRIAL PAGES 129 to 133

The 39(a) Session was called to order at 1120 hours, 4 June 1985.

MJ: This Article 39(a) Session will come to order, please be seated.

TC: Your honor, all parties who were present when the Article 39(a) Session last recessed are again present, no party required to be present is absent, there are no witnesses or members present.

MJ: I am going to grant the defense motion to dismiss the Alaska offenses. I'll make certain comments in support of that ruling. First, I will compliment counsel for their excellent briefs and arguments in laying out the issues on that matter.

I. The considerations; Constitutional; Supreme Court decisions in *O'Callaghan, Relford, Sehlesinger*, the provisions Rule for Court Martial 203 and its discussion and it analysis; The Court of Military Appeals decisions were all cited. Certainly the earlier cases, very closely on point, as Government pointed out many of them dated in 1969 and presumably back-logged on the docket at the time of the *O'Callaghan* decision, up to and through *Lockwood* and even more recently *Johnson* and other cases and numerous Court of Military Review cases that were cited and argued. Pendant jurisdiction was found to be not applicable to establish jurisdiction in this case though I have considered it, escpecially in light of *Lockwood*. I have applied a preponderance of the evidence standard with the Government having the burden of persuasion.

II. In simple terms my finding is that the Government hasn't met its burden. I certainly recognize a continuing evolution of the concept of subject matter jurisdiction in military jurisprudence. Nevertheless, I

recognize what the law is and am not necessarily applying where it may be going.

III. I adopt as essential findings of fact the stipulation of fact for the jurisdictional motion which has been entered into by the parties in this case.

With respect to the *Relford* factors:

– I find that the accused was properly absent from his unit at the time of each of the alleged offenses.

– Each offense was alleged to have occurred away from any military base at the accused's residence in the civilian community.

– Each offense was alleged to have occurred in a place not under miltary control.

– Each offense was alleged to have occurred within the territorial limits of the United States.

– None of the offenses was alleged to have been committed during time of war and all offenses were unrelated to authority stemming from the war power.

– The accused did not use his military position to commit any of the alleged offenses, nor did he commit any of the alleged offenses while performing his military duties. In short, there was no connection between the accused's military duties and the alleged offenses.

– The victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses.

– Civilian courts are present and available to adjudicate the offenses. While the State of Alaska has presently deferred prosecution in light of this proceeding, the State has not waived prosecution, nor declined to prosecute.

– Accused was not in uniform and in no way flouted military authority at the time of the alleged offenses.

– None of the alleged offenses posed a threat to any military installation. None of the alleged offenses resulted in any violation of military property.

– All of the alleged offenses are of the type traditionally prosecuted by civilian courts and are specifically of the type the Coast Guard has recently consented to have civilian courts prosecute Coast Guard members for in Alaska.

With respect to those so-called "additional *Relford* factors":

– There is no essential interest of the military in the security of person or property on post in this case.

– No issue challenges the Commander's responsibility and authority to maintain order.

– There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personal assigned there, nor on military operations or missions. The impact apparent in this case, that is, on the parents and the victims themselves is no different than that which would be produced by civilian perpetrator.

– There has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses. To the contrary, Appellate Exhibit X suggests that civil courts in Alaska have recently produced results highly satisfactory to the military in similar cases.

–The Constitutional authority of Congress to authorize Court-Martial trials for other than purely military offenses is recognized and respected, as are the precedents of higher level courts.

–The particular geographic situation in Juneau with access restricted to sea and air is not unlike that of Hawaii at the time of the offense in *O'Callaghan*, and the population of the Coast Guard in Juneau in relation to the population at large did not create a relationship of a pseudo-military camp or instillation. The fortuitous selection of Coast Guard member's housing in relative proximity to one another in the Mendenhall Valley likewise did not create any relationship between civilians and the military, calling for the exercise of military jurisdiction for the offenses allegedly committed there. Here we do not have a case of inability to distinguish the military from the non-military area of a post or between the accused's on duty versus off-duty time while on post. These alleged offenses are off duty and off post.

–The historical fact that Court-Martial jurisdiction has been exercised over offenses which victimized the persons of someone associated with the military is recognized, as is the fact that *O'Callaghan* and other precedents did not intend to limit Courts-Martial to purely military offenses.

The offenses charged are not purely military offenses. There was a *de minimus* military relationship between the accused and the military fathers of the victims. Those relationships were founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships. There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. As to the effect of the alleged incidents toward

the Coast Guard within the civilian community, there has been speculation by military personnel, but little more. No unfavorable publicity in the Juneau Empire or otherwise has been introduced into evidence. There is no evidence that these alleged offenses were known by anyone in the community to have taken place, outside of law enforcement circles. I find no adverse impact on the reputation of the Coast Guard in Juneau has resulted from these incidents. The on-base association between the accused and the alleged victims was minimal and did not provide the accused with the opportunity to commit the acts giving rise to the charged misconduct. The occupancy by military personnel and their families of homes in the Mendenhall Valley area of the City of Juneau, Alaska, including several military families living within close proximity to each other, did not convert that area into a military base or property otherwise under military control. The fact that several military members purchased homes in proximity to one another did not bring these offenses within the "at or near" meaning of a military base or otherwise make them on base. I acknowledge a certain amount of logic in the judicial economy argument put forth by the Government and that political or economic considerations may support exercise by this court of jurisdiction. However, those factors along with all others have not demonstrated a superior military interest in handling these offenses. The allowances paid by the military and authorized by Congress for military personnel in Juneau, Alaska to live off base do not support the exercise of Court-Martial jurisdiction for offenses allegedly committed in the residential area of the civilian community by military members, but tend to support a conscious choice not to create military enclaves with a recognition of the authority of civil authorities to exercise jurisdiction in those areas. Again Appellate Exhibit X provides support in this regard. The impact of the

alleged offenses, primarily reflected in the testimony of the service member parents of the victims, is that which might be expected of the victim of any crime of a similar nature, and while that impact may manifest itself in the work situation of those members, it does not rise to the level to compel the exercise of Court-Martial jurisdiction in these circumstances. In this regard, I note the increased caution of the parents victims may now exercise over their children, the requirements for counseling, anxiety, and time away from work for legal proceedings. These concerns would be the same whether the status of the offender were military or civilian. There has been no impact on transfer of military personnel within the meaning of the Personnel Manual provisions which have been taken judicial notice of. There have been transfers of all involved parties without restrictions.

With respect to the Coast Guard Advocacy Program, I find that Commandant Instruction 1750.3 as supported by the testimony of Captain Caprio, who was a participant in the founding of that policy specifically excludes the situation at present from its definition of child abuse. As defined in that instruction child abuse relates solely to intra-family type relationships and family there is defined not to include its broader definition of the Coast Guard family. The instruction specifies and in enclosure three that local laws shall govern and adopts the requirements to report in accordance with local laws and mentions that local jurisdiction shall control. Paragraph 4f states a policy to relinquish federal jurisdiction and specifies in paragraph 4d that the court action of local authority shall be considered separate and distinct. Those same considerations that I have focused on from the Family Advocacy Program instruction are reflected in the other document taken Judicial Notice of the pamphlet Charting Your Life in

the Coast Guard primarily those on page 113 and there abouts where many of the provisions of the instruction are just repeated. In light of the facts as found and in particular the reach of the Coast Guard Family Advocacy Program, I find that the Coast Guard interest in deterring these offenses is not distinct from that of civilian society and is less than that of civilian society, and what little if any distinct military interest there may be, can be adequately vindicated in civilian courts.

MJ: Subject to amendment and correction at the time of authentication those should constitute the essential findings of fact on that motion. Is the defense ready to proceed with other motions?

APPENDIX F

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES

v.

RICHARD SOLARIO
549 04 2211
Yeoman First Class, E-6
U.S. Coast Guard

SUPPLEMENTAL ESSENTIAL FINDINGS OF FACT

1. Having reviewed the record of trial, and prior to authentication, I hereby supplement my essential findings of fact made on 4 June 1985 with the following additional essential findings of fact.

2. To the extent that trust had a bearing on the opportunity for the alleged offenses, that trust arose out of friendships between the Solorio and Johnson and Solorio and Grantz families and not out of the respective fathers common association as members of the U.S. Coast Guard. The trust placed in a servicemember in general, and in the accused in particular, by virtue of status as a member of the Coast Guard was minimal and had no direct relationship to the offenses alleged.

3. No on base associations or contacts led to or had any connection with the alleged offenses.

4. Crime has an impact. The impact is felt on the victim and on those close to the victim. It is also reflected in the greater society of which the victim and offender are a part. Impact may be direct or indirect. In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service connection.

That indirect impact consists of servicemember-parents preoccupation with family situation affecting the members performance, some initial counselling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J. Good order, discipline, morale and welfare of servicemembers have not been directly impacted. Service reputation has not been adversely affected and those attributes of service reputation in a community which have been testified about, for example, credit worthiness, job stability for spouses, members and families access to community activities; would not be negatively impacted if these offenses were to come to light.

5. If the alleged Alaska offenses were to be made public, the future reputation of the Coast Guard in the community of Juneau will be affected only slightly in view of the solid reputation the service enjoys in that community. That reputation would be further enhanced if the alleged military offender were promptly turned over to local authorities for prosecution.

6. The offenses alleged to have occurred in Alaska are significantly remote in time and place from those alleged to have occurred in New York.

Done at Washington, DC
This 20th day of June 1985

/s/ PAUL M. BLAYNEY
Paul M. Blayney
Commander, U.S. Coast Guard
Military Judge

Original: Record of Trial
Copy: Trial Counsel, LCDR F. Couper, USCG
Detailed Defense Counsel, LT A. Hochberg, USCGR

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